Supreme Court, U.S.
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No. 85-1131

In the Supreme Court of the United States

October Term, 1985

WHITTAKER CORPORATION,

Petitioner,

v.

VIVIAN WILDER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the petitioner's admitted failure to raise any claim for arbitration under the federal Arbitration Act, 9 U.S.C. §1 *et seq.*, at any stage of an earlier proceeding to compel arbitration in this case which resulted in a final appellate decision adverse to petitioner; and the lower court's express and dispositive holdings under state law that the petitioner is not entitled to relitigate this matter or to compel arbitration herein, preclude the petitioner's attempt to relitigate the matter of arbitration in this Court.

2. Whether the lower court's comments, consistent with federal law, that the federal Arbitration Act is inapplicable to the facts herein on the bases that respondent's employment was not covered by the Act, being in a "class of workers engaged in foreign or interstate commerce" (9 U.S.C. §1), and that grounds exist at law or in equity for the revocation of the subject arbitration provision, 9 U.S.C. §2, present any issue which meets this Court's established standards of substantiality for purposes of review.

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SUMMARY OF ARGUMENT

This Court is without jurisdiction to review the judgment of the California Court of Appeal in Wilder II [169 Cal.App.3d 969, 215 Cal.Rptr. 536 (1985)] which expressly and adequately rested on well-established and independent principles of state law which had previously determined the non-existence, invalidity, and unenforceability of any purported arbitration agreement between Ms. Wilder and the Whittaker Corporation ("Whit-

taker"), and which were applicable in Wilder II under California's equally well-established law of the case doctrine. Whittaker's admitted failure to raise any federal claim for arbitration at any stage of the proceedings in Wilder I [*Wilder v. Whittaker Corp., et al.*, 2nd Civil No. 65676, Second Appellate District, (September 30, 1983)] precludes it from relitigating the matter of arbitration in this Court under the guise of a never-before-raised claim under the federal Aribtration Act, 9 U.S.C. §1, *et seq.*

The lower court's comments that the federal Arbitration Act is inapplicable to the facts herein on the bases that the subject employment agreement is not within the purview of the federal Act, as Ms. Wilder's employment in Abu Dhabi was in a "class of workers engaged in foreign or interstate commerce" (9 U.S.C. §1); and that grounds "exist at law or in equity for the revocation of any contract" (9 U.S.C. §2) are consistent with federal law and the purpose of the Act. This case does not involve any issue which transcends the facts of this case or which meets this Court's established standards of substantiality for purposes of review.

ARGUMENT

I

THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THE JUDGMENT OF THE CALIFORNIA COURT OF APPEAL IN WILDER II BECAUSE THE STATE COURT'S DECISION CLEARLY AND EXPRESSLY RESTED ON ADEQUATE INDEPENDENT NON-FEDERAL GROUNDS

Respondent Vivian Wilder respectfully submits that this Court does not have jurisdiction to review the judgment of the California Court of Appeal in Wilder II [169 Cal.App.3d 969, 215 Cal.Rptr. 536 (1985)] because the state court's decision clearly and expressly rested on adequate independent non-federal grounds. *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940); *Herb v. Pitcairn*, 324 U.S. 117 (1945); *Jankovich v. Indiana Toll Road Comm.*, 379 U.S. 487 (1965); and *Michigan v. Long*, 463 U.S. 1032 (1983).

In Wilder II, the state Court of Appeal applied California's law of the case doctrine to Whittaker's second attempt to compel arbitration in this case on the basis of the appellate court's earlier decision in Wilder I [*Wilder v. Whittaker Corp., et al.*, 2nd Civil No. 65676, Second Appellate District, (September 30, 1983)] which rejected Whittaker's assertion under state law that it was entitled to arbitration herein. (Whittaker's Petition for Writ of Cert., Appendices A and E). No federal issue was raised or decided in Wilder I as Whittaker admittedly did not make any claim under the federal Arbitration Act, 9 U.S.C. §1, *et seq.*, at any stage of the proceedings therein. Wilder I became final and conclusive respecting arbitration following the California Supreme Court's denial of Whittaker's petition for hearing on January

4, 1984. (Whittaker's Petition for Writ of Cert., Appendix F.)

Thus, it is clear beyond cavil that Whittaker's second petition to compel arbitration was nothing more than an improper attempt to relitigate the decision in Wilder I under the guise of a never-before-raised claim under the federal Arbitration Act. See: *Towers, Perrin, Forster & Crosby, Inc. v. Brown*, 732 F.2d 345 (3d Cir. 1984). Indeed, both of the decisions in Wilder I and II were based on the same factual record.[1]

In Wilder I, the Court of Appeal examined Whittaker's initial attempt to compel arbitration under established state law principles governing the existence, validity, and enforceability of arbitration agreements. The court held, on multiple, alternative rulings of fact and law, that, under the facts of this case: (a) Ms. Wilder "never agreed to arbitrate controversies concerning her employment contract and cannot now be compelled to accept

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[1]The evidence in this record, and particularly the documentary evidence herein, demonstrates that Ms. Wilder's discharge had nothing to do with any purported concern for her safety. Indeed, Whittaker's safety rationale, raised for the first time in its brief in support of an unsuccessful petition for review to the California Supreme Court following the decision in Wilder I, completely fails to explain Ms. Wilder's discharge from the Corporation in Los Angeles. The facts are that in July, 1980, after 19-1/2 years of devoted service to Whittaker, Ms. Wilder was singled out and discharged from all employment with the Corporation under the false pretextual reason that there was no suitable position available for her anywhere in the Company in order to cover-up the real reasons for the discharge: (a) retaliation against Ms. Wilder for having prepared the draft of an innocuous article for an employee newsletter in Abu Dhabi that mentioned the availability of a two day vacation sea cruise from Cyprus to the "Holyland"; (b) to protect Whittaker's financial position with the Government of Abu Dhabi; and (c) to appease the anti-Jewish, anti-Israel passions of Whittaker's Abu Dhabi benefactor.

arbitration." (Whittaker's Petition for Writ of Cert., Appendix E at E21)[2]; (b) the subject arbitration provision was unilaterally imposed on her without her knowledge or consent; (c) arbitration was beyond Ms. Wilder's reasonable expectations; (d) the terms of the subject arbitration provision are unreasonable, inequitable and unconscionable; and (e) Whittaker breached the terms of the subject provision by its failure to institute or complete any action in accordance with an internal complaint and grievance procedure.[3]

These holdings were supported by the court's express reliance on applicable California state law: *Freeman v. State Farm Mutual Automobile Insurance Company,* 14 Cal.3d 473, 121 Cal.Rptr. 477, 535 P.2d 341 (1975); *Graham v. Scissor-Tail, Inc.,* 28 Cal.3d 807, 171 Cal.Rptr. 604, 623 P.2d 165 (1981); *Thomson v. Continental Ins. Co.,* 66 Cal.2d 738, 59 Cal.Rptr. 101, 427 P.2d 765 (1967); *Neal v. State Farm Ins. Cos.,* 188 Cal.App.2d 690, 10 Cal.Rptr. 781 (1961); *Pacific Investment Co. v. Townsend,* 58 Cal.App.3d 1, 129 Cal.Rptr. 489 (1976); *Wheeler v. St. Joseph Hospital,* 63 Cal.App.3d 345, 133 Cal.Rptr. 775 (1976); *Hope v. Superior Court,* 122 Cal.App.3d 147, 175 Cal.Rptr. 851 (1981), *cert. den.* 456 U.S. 910 (1982); *Painters Dist.*

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[2]This determination was based on abundant and substantial evidence and is not open to dispute. Nor may Whittaker seek to reargue the facts in this Court. *American Radio Assn. v. Mobile Steamship Assn.,* 419 U.S. 215 (1974).

[3]Whittaker's attempt to relitigate the record in this Court neither mentions nor disputes the lower court's determinations that arbitration was beyond Ms. Wilder's reasonable expectations; and that Whittaker breached the subject provision by failing to institute or complete any action in accordance with an internal complaint and grievance procedure. These prior rulings are also the law of this case and dispositive of Whittaker's second petition to compel arbitration.

Council No. 33 v. Moen, 128 Cal.App.3d 1032, 181 Cal.Rptr. 17 (1982); and *Ashland Chemical Co. v. Provence*, 129 Cal.App.3d 790, 181 Cal.Rptr. 340 (1982).

Thus, in Wilder II, the Court of Appeal properly framed the dispositive issue in this case in terms of California state law:

> Issues
>
> Whittaker contends the trial court erred in determining that the doctrine of "law of the case" precludes Whittaker from asserting a federal right to arbitrate. Wilder contends the appeal is frivolous and seeks sanctions. (*Wilder, supra*, 169 Cal.App.3d at 972, and Whittaker's Petition for Writ of Cert.; Appendix A at A2).

This was resolved in Ms. Wilder's favor by the Court of Appeal's express holdings under state law that: (a) the decision in Wilder I is the law of this case—with emphasis on the prior determinations that "there was no agreement to arbitrate" (*Id.* at 974 & A6), and that the subject arbitration provision is adhesive and "unconscionable" (*Id.* at 975 & A8); and (b) "we perceived no manifest injustice in the trial court's application of the doctrine of law of the case." (*Id.* at 974 & A6). The applicability of the law of the case doctrine was supported by express reliance on California state law: *Davies v. Krasna*, 14 Cal.3d 502, 121 Cal.Rptr. 705, 535 P.2d 1161 (1975); *Puritan Leasing Co. v. Superior Court*, 76 Cal.App.3d 140, 142 Cal.Rptr. 676 (1977); *Selby Constructors v. McCarthy*, 91 Cal.App.3d 517, 154 Cal.Rptr. 164 (1979); and 6 Witkin, California Procedure (2d ed. 1971) Appeal, §§633, 650 and 651.[4]

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[4]Indeed, both parties have relied on the decision in Wilder I (and Wilder II) by subsequently engaging in formal discovery procedures including depositions, interrogatories, requests for

While the lower court also commented correctly that the federal Arbitration Act is inapplicable to the facts *sub judice*, it is clear that these comments are dicta, or, at most, alternative holdings which were unnecessary to the appellate court's judgment in Wilder II. Consequently, this Court is without jurisdiction to review the judgment in Wilder II which expressly and adequately rested on well-established and independent principles of state law which had previously determined the non-existence, invalidity, and unenforceability of any purported arbitration agreement between Ms. Wilder and Whittaker, and which were applicable in Wilder II under California's equally well-established law of the case doctrine. *Fox Film Corp. v. Muller*, 296 U.S. 207 (1938); and *Jankovich v. Indiana Toll Road Comm., supra.*

Moreover, Whittaker's admitted failure to raise any claim under the federal Arbitration Act in its initial petition to compel arbitration or at any stage of the proceedings in Wilder I cannot be turned to the advantage of the Whittaker Corporation. To the contrary, Whittaker's decision not to raise any federal claim in Wilder I forecloses Whittaker's attempt to disregard the adequacy of California's law of the case doctrine in Wilder II. The decision in Wilder I did not require or contemplate any subsequent or further

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identification and production of documents, and requests for admission of facts and genuineness of documents; all in preparation for a jury trial scheduled for April 4, 1986. These procedures have been time-consuming and expensive. And Ms. Wilder has been forced to seek and obtain several court orders in aid of her discovery of critically relevant facts which Whittaker has consistently refused to disclose absent said court orders. It is therefore clear that only the judicial process can adequately safeguard Ms. Wilder's right to a fair and impartial resolution of her claims and prevent Whittaker's continuing attempt to insure that her claims will never be reviewed.

proceedings regarding arbitration. Wilder I was final and conclusive respecting arbitration and left nothing further for any court to do in this regard except to insure Ms. Wilder's right to a jury trial on the merits of her action. *Towers, Perrin, Forster & Crosby, Inc. v. Brown, supra;* and *Lounge-A-Round v. GCM Mills, Inc.*, 109 Cal.App.3d 190, 166 Cal.Rptr. 920 (1980).

Whittaker's reliance on *Hathorn v. Lovorn*, 457 U.S. 255 (1982) is inapposite. In *Hathorn*, this Court held on the facts therein that it was not precluded by the Mississippi Supreme Court's assertion of its law of the case doctrine from reviewing a federal Voting Rights Act issue involved in a challenge to a state election law because: (a) the federal issue had been raised and determined in the earlier state court proceeding assertedly covered by the law of the case doctrine; and (b) the Mississippi Supreme Court's history of irregular application of its procedural rule rendered it an inadequate state ground for precluding this Court's jurisdiction. In contrast, Whittaker's admitted failure to raise any federal issue in Wilder I and the well-established nature of California's law of the case doctrine preclude any such claims in the instant case. Wilder II rested on adequate independent non-federal grounds.

II

THE LOWER COURT'S COMMENTS THAT THE FEDERAL ARBITRATION ACT IS INAPPLICABLE TO THE FACTS HEREIN WERE CORRECT AND DO NOT PRESENT ANY SUBSTANTIAL FEDERAL QUESTION

The opinion in Wilder II makes clear that even considering Whittaker's claim under the federal Arbitration Act, it is meritless and insubstantial for purposes of this Court's jurisdiction. And contrary to

Whittaker's assertions, the lower court's dicta or alternative holdings concerning the inapplicability of the Act to the facts herein were based on established federal standards in keeping with the purpose of the Act.

The Court of Appeal correctly commented, on the basis of substantial evidence, that the Act's exclusion of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." (9 U.S.C. §1), unquestionably applies herein. The undisputed facts established that Ms. Wilder was Whittaker's "Travel Supervisor" while employed under her written employment contract with Whittaker in Abu Dhabi. In this position, she had primary responsibility for arranging for and assisting in the travel of Whittaker's employees to and from Whittaker's health care project in Abu Dhabi. Indeed, 50% of these employees were from either North America or Europe and arranging for and assisting in their travel to and from Abu Dhabi directly involved Ms. Wilder in "foreign or interstate commerce."

Moreover, Whittaker has conceded the applicability of the Act's exclusion clause. In its efforts to show that Ms. Wilder's employment in Abu Dhabi involves "commerce" within the Act, Whittaker argued to the Court of Appeal that its hospital project in the United Arab Emirates involved world-wide travel by employees and shipment of materials from all over the world to the United Arab Emirates. If these facts evidence a transaction involving "commerce" for purposes of the Act's general coverage provision, they must also establish that Ms. Wilder, who was directly involved in said travel, was within a "class of workers engaged in foreign or interstate commerce" and is thereby excluded from coverage under the Act's own limitation. *United*

Electrical, R. & M. Wkrs. v. Miller Metal Prod., 215 F.2d 221, 224 (4th Cir. 1984).

None of the cases cited by Whittaker permit a contrary conclusion. Not one of these cases bears any factual resemblance to the facts of this case. Rather, in support of respondent's position, courts have viewed the exclusion clause as applying to "employees involved in, or closely related to the actual movement of goods in interstate commerce." *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972). And the facts established herein that Ms. Wilder, as Whittaker's Travel Supervisor in Abu Dhabi, was both closely related to and directly involved in the actual movement of people and goods in foreign commerce, i.e. she was a "worker engaged in foreign or interstate commerce."

The Court of Appeal also correctly commented that the subject arbitration provision is unenforceable under that portion of the Act which denies enforcement of arbitration provisions where grounds "exist at law or in equity for the revocation of any contract." 9 U.S.C. §2.

The determinations of fact herein established the most basic defenses to an action to enforce an alleged contract known to federal law, i.e. the failure of contract formation due to the lack of an agreement between the parties or knowing consent to the terms of the alleged contract; the invalidity of terms which are beyond a party's reasonable expectations or which are adhesive and unreasonable, inequitable or unconscionable; and, the breach of a material term by the party seeking enforcement so as to render the term sought to be enforced inapplicable and unenforceable. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363

U.S. 574 (1960); *Chandler v. Aero Mayflower Transit Company*, 374 F.2d 129 (4th Cir. 1967); and *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

The propriety of the Court of Appeal's decision herein was most recently confirmed by this Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. ___ 105 S.Ct. 3346, 87 L. Ed.2d 444 (July 2, 1985). In *Mitsubishi*, the Court explained that while the federal Arbitration Act was designed for the purpose of enforcing "freely negotiated" (*Id.*, 87 L. Ed.2d at 458) commercial arbitration agreements:

> Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or *overwhelming economic power* that would provide grounds 'for the revocation of any contract.' 9 U.S.C. sec. 2; see *Southland Corp.*, ___ U.S. ___, at n. 11 [citation omitted]. *Id.*, 87 L. Ed.2d at 455 (emphasis added).

The Court went on to emphasize that the Act denies enforcement to arbitration agreements, and particularly forum-selection clauses, where:

> the agreement was '(a)ffected by fraud, undue influence, or overweening bargaining power,' that 'enforcement would be unreasonable and unjust,' or that proceedings 'in the contractual forum will be so gravely difficult and inconvenient that (the resisting party) will for all practical purposes be deprived of his day in court. *Id.*, 87 L. Ed.2d at 459.

These federal standards were applied herein. The Court of Appeal properly commented on the basis of substantial evidence that the subject arbitration

provision was unilaterally imposed on Ms. Wilder by Whittaker for its own unconscionable advantage and was, therefore, unenforceable.

Whittaker's reference to *Dryer v. Los Angeles Rams*, 40 Cal.3d 406, ___ Cal.Rptr. ___, ___ P.2d ___ (No. LA 31889, December 5, 1985) is inapposite. *Dryer* neither raised nor decided any issue under the federal Arbitration Act. Rather, the case involved the federal Labor Management Relations Act, 29 U.S.C. §185(a) and the enforceability thereunder of an arbitration provision contained in the National Football League collective bargaining agreement. Neither national labor policy nor the collective bargaining agreement at issue in *Dryer* have anything to do with the instant case.

Moreover, Whittaker's reference to the trial court decisions in *Chambers & Matson v. Whittaker Corporation*, Los Angeles Superior Court, No. C253219 (January 13, 1979); *Todd v. Whittaker Corporation*, Madera County Superior Court, No. 23233 (December 3, 1979); *Merrill v. Whittaker Corporation*, U.S.D.C., Mass., No. 81-0315-F (July 1, 1982); *Hoffman v. Whittaker Corporation*, U.S.D.C., N.D.Cal., No. CU-84-6316 (May 21, 1985); and *Walsh v. Whittaker Corporation*, U.S.D.C., W.D.Wash., No. 689-1353D (July 23, 1985) does not alter the propriety of the Court of Appeal's comments herein.

None of these cases bear any factual resemblance to the instant case or involve any claim of wrongful discharge or the kind of mistreatment experienced by Ms. Wilder. Nor did any of these cases involve a comparable claim demonstrating the non-existence of an agreement to arbitrate; or the invalidity or unenforceability of the subject arbitration provision; or the inapplicability of the federal Arbitration Act to the

instant employment contract which is excluded from its coverage. Instead, all of these cases were brought by former employees who had voluntarily left their jobs in Saudi Arabia and who claimed that Whittaker had fraudulently induced them to go to Saudi Arabia or had otherwise breached its contractual obligations. That these former employees were unable to show why arbitration was inappropriate in their cases in no way affects the overwhelming factual showing made by Ms. Wilder in the instant case. Thus, where, as here, the facts show no basis on which to order arbitration, there is no public policy favoring arbitration and Ms. Wilder cannot be compelled to accept arbitration in place of her constitutional right to jury trial herein.

Therefore, the lower court's comments pertaining to the inapplicability of the Act to the facts herein are consistent with federal law and the purpose of the Act. This case does not involve any issue which transcends the facts of this case or which meets this Court's established standards of substantiality for purposes of review. *Black v. Cutter Laboratories*, 351 U.S. 292 (1956).

CONCLUSION

For the foregoing reasons, Whittaker's petition for a writ of certiorari should be denied.

DATED: January 31, 1986

Respectfully submitted,

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By _____
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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on January 27, 1986, I served the within *Brief in Opposition to Petition for Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
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(Original and forty copies)

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I declare under penalty of perjury that the foregoing is true and correct. Executed on January 27, 1986, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)